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In the Supreme Court of the United States

OCTOBER TERM, 1953

[illegible] STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 109

RALPH G. LEMKE, *Petitioner*

v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority and dissenting opinions of the Court of Appeals (R. 129-130) are reported at 203 F. 2d 406.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1953, and the petition for rehearing was denied on May 14, 1953 (R. 132-

133). The petition for a writ of certiorari was filed on June 8, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the Court of Appeals properly dismissed as premature an appeal taken from a sentence imposed in open court, instead of from the formal judgment of sentence and commitment, which was not filed until several days later.

STATUTE AND RULES INVOLVED

Section 65-5-81, Alaska Compiled Laws Annotated, 1949, provides:

> That if any person shall * * * by any * * * false token, and with intent to defraud, obtain, or attempt to obtain, from any other person any money or property whatever * * * such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than five years. * * *

Rule 32(b), F. R. Crim. P.:

> *Judgment.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. * * * The judgment shall be signed by the judge and entered by the clerk.

Rule 37(a)(2), F. R. Crim. P.:

> *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from * * *.

STATEMENT

Petitioner was charged under a one-count indictment in the Fourth Judicial Division of the Territory of Alaska with violation of Section 65-5-81, Alaska Compiled Laws Annotated, 1949 (*supra*, p. 2), by feloniously attempting to obtain money from the Civilian Mess at Ladd Air Force Base, Alaska, by false token and with intent to defraud, in that petitioner, as the authorized agent of the mess, signed and presented for payment receipts for $60 in merchandise, which petitioner knew had not been received. The indictment charged that it was prearranged that the $60 when paid would be divided, $20 for the alleged seller and $40 for petitioner. (R. 1.)

After a jury finding of guilty (R. 5) petitioner on March 10, 1952, was sentenced to six months in jail, and given until 2 p.m. on March 12 to file a stay bond for $2,000 (R. 119-120, 123). Petitioner's counsel asserts in an affidavit that he gave notice of appeal in open court on March 10; that he assumed that the judgment had been entered on that date when sentence was imposed; and that he was of the opinion that the court, when approving the stay bond, was under the impression that

the judgment had been entered (R. 121). On March 11 petitioner filed his notice of appeal from the sentence of March 10 (R. 8-9, 123). On March 12 the required $2,000 stay bond was filed (R. 9-11, 123). On March 14 the judgment and commitment reciting the sentence of March 10 was filed and entered (R. 6-8, 123).

The court below dismissed the appeal as premature since the only judgment sentencing petitioner was entered on March 14, 1952, and no appeal was taken from this judgment. One judge dissenting thought that the notice of appeal, though premature, was not a nullity and that the irregularity should be disregarded under Rule 52(a), F. R. Crim. P. (R. 129-132.)

The evidence adduced by the Government at the trial below may be summarized[1] briefly as follows:

Petitioner, the manager of the Civilian Mess at the Ladd Air Force Base, purchased food from various persons, one of whom was a farmer, Elbert. The procedure followed was for petitioner to sign the invoices for food purchased and present them to the bookkeeper for the mess accounts, after which the bookkeeper would check the invoices for accuracy, enter them, and pay the amounts due by check. (R. 58, 62-63.)

[1] We summarize the evidence since we think that, even though the court below did not reach a consideration of the merits, the dismissal may also be sustained on the ground that the appeal was frivolous. See pp. 8-10, *infra*.

On or about October 9, 1951, petitioner approached Elbert with a proposition for him to make out a false bill for $60 for food not to be delivered, Elbert to retain $20 after payment was made and petitioner to receive $40 (R. 23). Elbert reported the incident to the Air Force Office of Special Investigation (O.S.I.) on October 10, and executed a false invoice for $60 worth of cabbage, which was initialed by O.S.I. officials (R. 23, 25, 26, 42-43, 51). When Elbert approached petitioner with the $60 invoice, petitioner suggested three $20 invoices instead. Accordingly, Elbert executed two invoices of $20 each for cabbage and one of $20 for celery, and petitioner signed them even though he knew the food had not been delivered. (R. 26, 28-30, 47-48, 52.) Since the O.S.I. officials were aware of petitioner's attempted fraudulent scheme, the bookkeeper on orders from his superiors did not make payments on the invoices (R. 64-65).

Petitioner, testifying on his own behalf, categorically denied any deal to cheat the mess of $60 for produce never delivered (R. 87). He denied ever seeing the $60 invoice which Elbert testified he had originally presented to petitioner before three $20 invoices were executed instead (R. 88, 99). He admitted his signatures on the three invoices, but stated that as far as he knew the produce had been received (R. 90-93).

The trial court refused to give two requested in-

structions by petitioner to the effect that a conviction cannot be had upon the uncorroborated testimony of an accomplice, and that testimony of an accomplice is to be viewed with distrust, on the ground that Elbert was clearly not an accomplice (R. 11-12, 84, 103). The court refused to give a third requested instruction to the effect that to justify a conviction there had to be an actual attempt by petitioner or Elbert to obtain money by means of a false token, on the ground that this had already been covered in the court's first instruction (R. 12, 103, 104-105).

ARGUMENT

1. There was no dispute in the court below and there can be no doubt as to the correctness of the ruling that petitioner's appeal was technically premature. Rule 32(b), F. R. Crim. P., provides that a "judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence," and that it "shall be signed by the judge and entered by the clerk." In the instant case while sentence was imposed upon petitioner on March 10, 1952, it was not until March 14 that the formal signed judgment and commitment reciting the sentence of March 10 was filed and entered (R. 6-8, 123). Since there was no judgment of March 10 from which the purported appeal was taken on March 11, the appeal was premature. Cf. *Prickett* v. *Consolidated Liquidating Corp.*, 189 F. 2d 8 (C.A. 9); *Uhl* v. *Dalton*, 151 F.

2d 502 (C.A. 9). See also *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177; *Reconstruction Finance Corp.* v. *Mouat*, 184 F. 2d 44, 48 (C.A. 9); *Healy* v. *Pennsylvania Railroad Co.*, 181 F. 2d 934 (C.A. 3).

Since, therefore, it is clear that the notice of appeal was defective, petitioner was not entitled to have his appeal considered on the merits as of right. It may be, as the dissenting judge below thought, that the court of appeals, in the exercise of its discretion, had the power to disregard the particular technical error here involved. However, its exercise of discretion not to do so—involving as it does a matter of the appellate court's control of the procedure before it—does not present an issue for review by this Court. It was clearly within the power of the court to require strict compliance with the applicable Rules.[2]

Luckenbach S.S. Co. v. *United States*, 272 U.S. 533, 535, a civil case, upon which petitioner and the dissenting opinion rely, is not controlling. There the appeal was taken after a formal judg-

[2] It is true that a mistake of petitioner's counsel in filing his notice of appeal before the formal judgment of sentence caused the dismissal of the appeal. It would also have been a mistake of counsel if he had not filed his notice of appeal until after the expiration of 10 days from the date of the judgment under Rule 37(a)(2), F. R. Crim. P., but in such a case the court would have been required to dismiss the appeal. Cf. *Marion* v. *United States*, 171 F. 2d 185, 186 (C.A. 9); *Swihart* v. *United States*, 169 F. 2d 808 (C.A. 10); *United States* v. *Bloom*, 164 F. 2d 556, 557 (C.A. 2). The two situations are not essentially different.

ment had been entered but before a motion for a new trial was decided. Here, there was no judgment from which the appeal could be taken at the time the notice of appeal was filed. Moreover, in *Luckenbach* after the motion for a new trial was denied the "application for an appeal was then brought to the Court's attention and allowed" (272 U.S. at 535), but there is no showing here that petitioner, after March 14, called the trial court's attention to his notice of appeal requesting that it run to the formal judgment of March 14 instead of to the sentencing of March 10.[3]

2. In any event, the points petitioner urged on appeal (see Pet. 6) are so frivolous that dismissal of the appeal would have been proper on that ground, and further review by this Court is thus not warranted.

Petitioner argues that the trial court erred in refusing to give two instructions to the effect that a conviction cannot be had upon the uncorroborated testimony of an accomplice, and that testimony of an accomplice is to be viewed with distrust (R. 11-12, 103). It is obvious that Elbert was not an accomplice since he had informed the

[3] Also not in point are cases cited by petitioner (see Pet. 4, 5) holding that where a notice of appeal is addressed to an effective final judgment, the date of which is mistakenly designated, the appeal is nevertheless well taken. E.g. *Porter v. Barden's Dairy Delivery Co.*, 156 F. 2d 798 (C.A. 9); *Shannon v. Retail Clerks, etc.*, 128 F. 2d 553, 555-556 (C.A. 7); *Wilson v. Southern Ry. Co.*, 147 F. 2d 165, 166 (C.A. 5). Cf. *Haines v. United States*, 335 U.S. 297.

O.S.I. officials in advance of petitioner's proposed illegal action, and cooperated fully with them in carrying out the venture, which ultimately incriminated petitioner alone. The following observation of the trial court regarding this is manifestly correct (R. 84):

> * * * I don't think that we have the question of an accomplice in this case at all, because Paul Elbert was designedly or very clearly not intending to commit a crime and not doing the acts which would constitute that crime. He had informed the O.S.I. officials, so that anything that he did would not result in the commission of a crime.

Petitioner's other principal contention was that the evidence was insufficient for conviction since there was no proof that either petitioner or his alleged accomplice ever made any attempt to obtain any money as a result of the admitted false token (R. 73-75, 77). However, the evidence disclosed that according to the prevailing custom, after the bookkeeper received the invoices which had been approved and signed by petitioner, there was no further action necessary on petitioner's part as a prerequisite to payment to the seller of the produce. Clearly petitioner had gone as far as he possibly could in his attempt to have payment on the false invoice made to Elbert, with

whom he intended to divide the proceeds. See trial court's comment, R. 84.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1953.

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[4] Another frivolous contention was that the indictment failed to state facts sufficient to constitute a crime (Pet. 6). The indictment (R. 1), which followed generally the language of the statute, and apprised petitioner with reasonable certainty of the elements of the offense so that he could prepare his defense thereto and plead the judgment as a bar to any other prosecution for the same offense, was sufficient. See *Hagner* v. *United States*, 285 U.S. 427, 431; *United States* v. *Britton*, 107 U.S. 655, 665; *United States* v. *Simmons*, 96 U.S. 360, 362.